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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE LEE MURBERGER,

Defendant and Appellant.

F077640

(Super. Ct. No. VCM337864B)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Tulare County. Brett R. Alldredge, Judge.

Jacquelyn Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Poochigian, J., and Snauffer, J.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment that finally disposes of the issues between the parties. (Cal. Rules of Court, rule 8.204(a)(2)(B).) Appellant Joe Murberger moved under Penal Code section 1538.5¹ at his preliminary hearing to suppress evidence. Therefore, this appeal concerns a denial of a motion to suppress evidence, and is thus proper pursuant to section 1538.5, subdivision (m), and Cal. Rules of Court, Rule 8.304, subdivision (b)(4)(A), which allow review of the validity of a search and seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. By order on November 21, 2018, this Court found the present case appealable under *People v. Panizzon* (1996) 13 Cal.4th 68 (*Panizzon*).

STATEMENT OF THE CASE

On July 13, 2016, a felony complaint was filed against Murberger and his wife Lisa Murberger.² Counts 2 and 4 were specific to Murberger. Count 2 alleged child abuse in violation of section 273A, subdivision (a), a felony, against child A.M. on July 11, 2016. The complaint alleged two priors: a violation of section 459 occurring in 1996, and a violation of Health and Safety Code section 11379.6, subdivision (a) in 2002. Count 4 alleged that Murberger was under the influence of a controlled substance, in violation of Health and Safety Code section 11550, subdivision (a), specifically methamphetamine, a misdemeanor, on July 11, 2016.

On January 9, 2017, prior to the preliminary hearing set for Murberger's case, defense counsel made a motion to suppress evidence under section 1538.5. On January 10, 2017, the Honorable Brett Alldredge jointly heard both the preliminary hearing and the motion to suppress. After listening to the testimony of Deputy Bryan

¹ Undesignated statutory references are to the Penal Code.

² Lisa Murberger is not a party to this appeal.

DeHaan³ of the Tulare County Sheriff's Department, Judge Alldredge denied the section 1538.5 motion to suppress. Murberger was then held to answer on count 2 of the complaint.

An information was filed on January 23, 2017, alleging count 2, a felony, against Murberger. The record does not reflect that the section 1538.5 motion to suppress was renewed at any time after the preliminary hearing.

On October 3, 2017, Murberger pleaded no contest to count 2, amended by order of the court to a misdemeanor under section 17, subdivision (b). The same day, the court sentenced Murberger to 4 years' probation, 30 days in custody, and 52 weeks of parenting classes, along with various fines and fees.

On October 24, 2017, Murberger filed a notice of a misdemeanor appeal to the Tulare County Superior Court Appellate Department. On April 17, 2018, defense counsel and the prosecutor stipulated to move the appeal to the Fifth District Court of Appeal. The Tulare County Superior Court ordered the transfer to the Fifth District Court of Appeal. However, the transfer was denied by the Fifth District Court of Appeal because the information had originally charged Murberger with a felony, and a felony appeal was therefore required. A felony notice of appeal was later filed, appealing the order denying the motion to suppress evidence in this case under section 1538.5. This court deemed the appeal as timely filed as of October 24, 2017.

On November 21, 2018, in response to an application for an order of appealability, this court found that Murberger may appeal the judgment of conviction issued by the Tulare County Superior Court, citing section 1237 and *Panizzon, supra*, 13 Cal.4th at p. 74.

³ Deputy DeHaan testified that, after obtaining verbal consent from Lisa Murberger to search the residence, he found multiple unsanitary conditions at the residence, rendering the residence uninhabitable. Minor A.M. was residing there with his parents, Mr. and Mrs. Murberger. Deputy DeHaan's testimony was un rebutted.

STATEMENT OF FACTS

On July 11, 2016, Deputy Bryan De Hann was dispatched to meet a representative from Child Welfare Services (CWS) about a mile away from the Murberger residence. The CWS worker had received an anonymous tip regarding the minor A.M. and uninhabitable living conditions. They had to meet a mile away because there was no address for the residence. Deputy DeHaan and the CWS worker proceeded the last mile together to the residence. Deputy DeHaan did not know how the CWS worker knew how to get to the residence. There was no warrant.

They accessed the home by a dirt roadway, and there was no fence or no trespassing signs. Deputy DeHaan made contact with Murberger outside the residence, near his vehicle in the front yard. They spoke, and Murberger said that A.M. was not home. Deputy DeHaan asked to go inside, but Murberger was hesitant because he said he had vicious dogs in the house. Deputy DeHaan asked for contact information to find A.M., and Murberger provided a phone number. The CWS worker attempted calling the phone number, but did not reach A.M.

While they were speaking, Deputy DeHaan noticed sewage leaking out of a PVC pipe coming from the house. Later, Deputy DeHaan noticed a small hand briefly in the window.

After this, A.M., who was visibly dirty, came out of the house, identified himself, and identified Murberger as his father. Deputy DeHaan asked Murberger if A.M. was his son; Murberger initially said A.M. was his relative's child, but then changed his answer.

Deputy DeHaan suspected Murberger was under the influence of drugs because of a chemical smell, eyelid flutter, rapid speech, and elevated pulse. Deputy DeHaan was performing the Romberg test on Murberger to determine whether he was under the influence, when Lisa Murberger came out of the house. Deputy DeHaan noticed Lisa had rapid speech and eyelid flutter. Deputy DeHaan asked her if she had used any controlled substances, and Lisa responded she had used controlled substances the day before.

According to Deputy DeHaan's testimony, Deputy DeHaan asked if he could enter the residence, and Lisa gave permission to enter the house, after advising she needed to lock up the dogs first.

Deputy DeHaan found wet floors throughout the home, a smell of mildew, and trash and feces on the ground. Murberger indicated that he had flooded the house when he tried to clear the septic tank backup. Deputy DeHaan found mattresses on the floor, knives on the ground and the counters, and dog feces inside. There were dishes in the kitchen and bathroom sinks. Murberger admitted conditions were bad and that was why he wanted to move out. Lisa and Murberger told Deputy DeHaan that they were preparing food at Murberger's mother's house, as well as outside on the barbeque.

APPELLATE COURT REVIEW

Murberger's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that Murberger was advised he could file his own brief with this court. By letter on December 18, 2018, we invited Murberger to submit additional briefing. On January 16, 2019, Murberger filed a response dated December 31, 2018, which we have read and considered.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The order is affirmed.